Negotiating Surface Rights

Alberta
AGRICULTURE, FOOD AND
RURAL DEVELOPMENT
Farmers' Advocate
Agdex 878-1

Copies of this publication may be obtained from:

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Alberta Agriculture, Food and Rural Development
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Edmonton, Alberta T6H 5T6
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Alberta Agriculture's district offices

Reprinted 1999 10 500
Revised 2000 4 1.5M

NEGOTIATING SURFACE RIGHTS

NEGOTIATING A SURFACE LEASE

The purpose of this pamphlet is to help landowners and occupants to negotiate a private agreement, understand the process involved in appearing before the Surface Rights Board and, in a limited way, understand the implications of the *Surface Rights Act*.

Ownership of land does not mean that the landowner has exclusive control of his property. Through special Acts, governments may permit others to acquire use of part of an individual's land. This is based on the assumption that acquiring the use of such land is in the general public's interest. Under common law the mineral owner has the right to enter upon the land held by the surface owner to work and remove the minerals. The surface owner's Certificate of Title is expressly made subject to the rights of the mineral owner. Pipelines and power lines are allowed on your land under statutory provisions.

The *Surface Rights Act* comes into effect when the surface owner or occupant and the company are unable or unwilling to reach a private agreement regarding the use of the land concerned.

One cannot say or predetermine whether compensation will be greater or less on a private agreement versus a Surface Rights Board Order. Cases have arisen in private negotiations where factors have been acknowledged and compensated for. In Board Orders this had not been a factor taken into account. In private negotiations anything is possible if agreed to by both parties, where before the Surface Rights Board you are governed by the *Surface Rights Act*.

Initial Contact

The land agent, either an employee of the company or an independent operator, approaches the landowner and offers a surface lease. By this time the company has either conducted a survey of the area of interest or informed the owner that a survey will take place. Surveyors have the right to come on the land to conduct a survey after they have made a reasonable attempt to give notice to the landowner or occupant. Any damage done during the course of the survey must be paid for by the company authorizing the survey.

Attached to the surface lease for a well site plus roadway, should be a map of the survey outlining the area the company wishes to obtain and a completed agreement outlining the compensation it is prepared to pay. Under the *Land Agents Licensing Act*, this document is to be left in the landowner's possession for a clear period of 48 hours (not including Sundays or legal holidays) before negotiations can resume. This does not preclude the landman from obtaining the opinion of the landowner as it pertains to the company's offer, nor does it prevent the landowner from waiving the 48-hour condition so that negotiations can begin immediately. **REMEMBER the 48-hour waiting period is provided for the landowner's protection and should be used to carefully study the document and the compensation offered.**

Location of Well Sites and Right-of-Way Agreements

Well locations are for the most part chosen on the basis of the operator's geological interpretation and the well spacing and target area requirements set out by the Alberta Energy and Utilities Board (AEUB). **The diagram on page 13** illustrates the target areas designated for oil and gas wells in a large portion of the province's agricultural areas. However, it should be noted that many areas have target areas which vary from those shown on the diagram. These variations are set out in specific spacing orders. Any questions respecting well spacing and target areas should be directed to the AEUB at (403) 297-8311.

If the location of the well site and access road proposed by the operator would have an unusual adverse effect on the land or land use, you should make your concerns known to the operator and endeavor to negotiate a reasonable and fair alternative. All of your concerns should be agreed upon prior to signing a private agreement. In the majority of cases the landowner and operator should be able to reach a mutually acceptable agreement. If not, you should contact the AEUB and advise them of the outstanding concerns. **The company must have landowner approval of location to obtain a licence (well site) or permit (pipeline) from the AEUB.**

If an agreement respecting the well site location and access road is reached, the operator will apply to the AEUB for a well licence. If a licence is issued and a surface lease has been signed, the operator can commence its operations. If a lease has not been signed the operator will apply to the Surface Rights Board for a Right-of-Entry Order.

The AEUB has broad jurisdiction and will consider objections (if private negotiations fail) in regard to the well site location, route of the access road and matters relating to the construction of the road. The Board is also responsible for safety, proper containment of all drilling fluids and well effluents, noise control and odors due to oil and gas facilities. The Board does not address the issues of compensation.

Topsoil – Reclamation, Alberta Environment

Prior to construction or site preparation, get information on the company's soil preservation practices and attempt to agree on the method to be used to preserve as much topsoil as possible on a pipeline, power line or well site area.

If there is any indication that proper construction methods are not being followed prior to or during the construction or site preparation of a well site, pipeline or power line, contact Alberta Environment. Where a lease is being abandoned, the company must obtain a Reclamation Certificate from Alberta Environment before it can surrender or terminate its surface lease or right-of-entry order. Annual payment if applicable, continues until this is done. If you encounter problems with any of the above or if you require further information, contact Alberta Environment, Land Management Program in Edmonton at (780) 427-5883.

Power Lines into Well Sites – Underground versus Above Ground

During the negotiation stage the landowner is in a position to negotiate whether power lines should be above or below ground. This should be done when the original agreement is signed. If the company wishes to bring power in from an alternate direction, then this would be negotiated when the easement is taken (assuming it is to come across your field and not follow the well site roadway). The placement of poles on the roadway can seriously inconvenience your farming operation and should be reflected in the annual compensation. If it isn't known and an agreement is signed, it's too late to make changes. Therefore, attention should be given at the time of negotiation to resolve this concern. However, each case should be decided on its own merit and particular set of circumstances.

Surface Lease

This is a document used to legally secure the interest a company takes in surface land for the purpose of extracting minerals. Most leases are of a general nature. For reasons of expediency companies have prepared the lease document. This differs from the general practice where the vendor or lessor is responsible for drawing up documents. Landowners are not obliged to use the lease offered by the company, but if you do, it can be modified to suit your specific set of circumstances. For example, you can address any concerns on: types of road and road ditches; fencing; handling of topsoil; herbicide spray; and, powerlines. In an attempt to address the main concerns, the Office of the Farmers' Advocate, in conjunction with the oil industry and the farming community, has devised a new model agreement called the "Alberta Surface Lease Agreement." This agreement takes into account common concerns and problems arising out of the lease agreement. It attempts to deal with the problems thoroughly while keeping in mind the concerns and needs of both the oil industry and the landowner. As indicated, this lease is a model. It can be used "as is" or clauses can be added or deleted to meet the needs of both parties. The lease is an important document and should be studied closely prior to signing. It sets out the terms and conditions which will govern all future transactions between the landowner and the company. For this reason it is critical that the lease be as comprehensive as possible and tailored to deal with your specific set of circumstances. Copies of the Alberta Surface Lease Agreement are available through the Office of the Farmers' Advocate or district offices of Alberta Agriculture, Food and Rural Development.

If the landowner rents or leases land, on which a company proposes to enter, consent of both landowner and occupant must be obtained prior to an agreement being negotiated.

Prior to signing any agreement it is imperative that a proper plan of survey be attached to form part of the surface lease. This is to ensure that you are aware of the area to be leased. The specific area contained in the well site and roadway (demised premise) is defined to be separate from the balance of the quarter (said lands). The company should not be allowed on your property other than to survey until the lease money has been paid.

A contract signed with the representative of a company, is not binding until duly authorized officers of the company accept the contract and affix the company's corporate seal to it. In most cases this takes a short time. Some company representatives have signing authority and carry a seal with them.

Most verbal promises are not binding and many contracts specifically state that the company does not acknowledge or honor such commitments. Landowners can ask for and insist on having special clauses added to a contract to accommodate special conditions or special requests in writing.

Once the farmer's signature is on the contract, the content cannot be altered. Always insist on a copy of the contract at the time of signing. If this is not possible, the company should sign first and return two signed copies to the farmer for signature. One is for the farmer's records. When in doubt, consult a lawyer to determine whether a particular lease document is legal and binding.

Land acquisition for strip mining solely for the extraction of minerals comes under the jurisdiction of the *Surface Rights Act*. Private negotiations should be dealt with in accordance with the foregoing.

Acquisition of land for facilities such as power plants or a tailing pond associated with mines, comes under the *Expropriation Act*. The operation of this Act is explained in the pamphlet, *Expropriation in Alberta*. This is available from Alberta Infrastructure's Property and Supply Management Division, Land Services Branch at (780) 415-1385.

HOW TO DETERMINE COMPENSATION

Entry Fee

An operator who proposes to exercise a right-of-entry on land other than land owned by the Crown, either by a Board Order issued by the Surface Rights Board or through a privately negotiated agreement, whether it be for a well site, pipeline or power line, shall pay an entry fee. The entry fee will be equal to the lesser of $5,000 or $500 per acre granted to the operator, or a proportionate amount, not to be less than $250, where the land granted to the operator is less than one-half acre. This shall be done prior to exercising any private agreement or Board Order to gain access to the land.

If for example the operator needs a 4.25 acre well site, he would pay an entry fee calculated as follows, 4.25 acres x $500 = $2,125. The maximum of $5,000 would usually only be obtained on a large site of 10 acres or more. If less than one acre in total is taken, then it's the fraction of one acre x $500, not to be less than $250. This does not apply to land used by gas co-ops, rural electrification associations or an operator of a local distribution system.

In addition, to the entry fee, the following points should be used when determining compensation payable:

1. Value of Interest Taken

In most cases this is determined by the amount one would expect to realize if the land granted was sold on the open market by a willing seller to a willing buyer on the date the right-of-entry order was issued, or the time frame when the private agreement was entered into. It is also based on the highest approved use of the land (agricultural or industrial). The per-acre value is determined by dividing the value of the titled unit by the number of acres required.

One should not place too much emphasis on the privately negotiated contracts of other landowners with other companies, as they pertain to what was paid for a particular well site and access road and one does not know the circumstances under which the amounts were negotiated.

2. Nuisance, Inconvenience and Noise

This heading is used to distinguish those nuisances and inconveniences that are peculiar to the first year, from those that reoccur annually, throughout the life of a well. The latter are considered under point 3, *Loss of Use of the Land* and point 4, *Adverse Effect*.

No doubt, a landowner will have a certain amount of inconvenience in dealing with the company's representatives and surveyors. He may be required to prepare documentation to present to them, make phone calls and seek advice from various authorities. There may be other related involvements which he otherwise would not have had to deal with. The landman is being paid to negotiate with the landowner; the landowner should be paid to negotiate with him. Therefore, a log of all time spent, phone calls made and expenses incurred should be recorded and reasonable compensation should be paid.

3. Loss of Use of the Land

The landowner will be deprived of the normal use of the site for as long as the surface lease remains in effect. Compensation for this land must be made on an annual basis. It should approximate the value of the gross annual production reasonably expected from the area lost. The reduction in major farm operating expenses for the landowner are virtually negligible on a small acreage of land.

One can use the greater of yield and price averages from the past five years, or today's street price to determine this figure. Assuming first-year wheat production at 40 bushels per acre on a well site and access road of four acres, the loss would be 4 x 40 or 160 bushels. At $4.50 a bushel the total annual loss on well site and access road would be $720.

Because you are asked to agree on losses for the next five years, consideration should be given to future prices.

4. Adverse Effect

One must also consider the adverse effect of the site on the remaining land. In addition to the nuisance and inconvenience created to the farming operation on the adjoining land, there is also a cost to changing the farming pattern on the adjoining land. There is no doubt that operating machinery around well sites, power lines or any of industry's above-ground structures is an inconvenience and nuisance to the farming operation during both the cultivating and harvesting operations. The constant turning of corners on all field operations causes overlapping, extra strain on machinery, undesirable compaction, loss of seed and grain, and additional field and labor costs. Also, easier access to your property due to the construction of an access road means the need for greater surveillance on your part.

5. Any Other Factors Which May be Relevant

The above points are the main factors that should be taken into consideration. Should there be any other relevant points that are specific to your operation, they should be included in determining compensation.

ANNUAL COMPENSATION

The sum arrived at by considering the above points makes up the first year of payment. It should be paid immediately prior to the drilling of the well or work being done on the land. Loss of use of the land (point 3) and adverse effect (point 4) make up annual compensation. It usually goes without saying that every year the well site is on the land, crop losses will occur under point 3 and inconvenience will occur under point 4. Therefore, compensation should include consideration for this inconvenience and loss.

If a farmer leases or rents land that a company proposes enter, it is up to the lessee and lessor to determine how the moneys will be divided. A common practice is for the lessor to receive the proceeds of entry fee, Value of Interest Taken, Nuisance, Inconvenience and Noise, and Any Other Factors. The lessee receives Loss of Use of Land and Adverse Effect. However, this is something that must be worked out between the lessor and the lessee, in a valid agricultural lease, except if a board order is granted under *The Surface Rights Act*, in which case it shall make the division of the awards. On Crown grazing leases, entry fee, points 1 and 5 are not applicable to the lessee (no entry fee or market value). However, points 2, 3 and 4 are.

The *Surface Rights Act* mandates the review of annual compensation every five years during the life of a well site. The Act states that an operator shall give notice to the lessor on or within 30 days after the fourth anniversary of the date the lease commenced or the Right of Entry Order was made. This does not prevent the landowner and the company from reviewing the compensation at shorter intervals, should there be changing circumstances or a substantial change of use relative to either the well site or the access road.

If the owner and the operator are able to reach agreement on a new rate of annual compensation, either the surface lease is amended to this effect, or the Surface Rights Board is notified of the agreement so that the compensation order can be amended to show the new rate of annual compensation.

If the owner and the operator cannot agree on a new rate of annual compensation, the owner or operator can apply to the Surface Rights Board in writing to have the board determine appropriate annual compensation. The board will hold a hearing and determine the annual compensation to be paid by the operator. The hearing provides an opportunity for both the owner and the operator to give evidence.

NEGOTIATING FOR RIGHT-OF-WAY AGREEMENTS

After January 1, 1977 pipeline and utility companies also gained right of entry under the *Surface Rights Act* to lay down and construct pipelines, power lines and telephone lines.

The Right of Way Agreement differs from a Surface Lease in that a Right of Way is a short term disturbance (generally one year). A Surface Lease can impact farm land until the site is reclaimed (which usually takes several years after abandonment of the well).

Damages are usually assessed within one crop season of installation of a pipeline.

Major transmission lines (easements) are long term agreements and qualify for an annual compensation payment, plus entry fee and market value of the land. A major transmission line is classified by the Alberta Energy and Utilities Board as a 69 kilovolt transmission line or larger. Distribution lines qualify for a one-time per pole payment.

Landowners need to ensure all their concerns are met when they negotiate a Right of Way Agreement. Clauses can be changed, added or deleted, if both parties agree.

For information on negotiating pipelines contact the farmers' advocate office at **310-0000, 427-2433 and request the pamphlet entitled** *Pipelines in Alberta – What Farmers' Need to Know.*

Right-of-Entry through Surface Rights Act if private negotiations fail

In the event that the company and the landowner are unable to privately negotiate an agreement as described above and if approval of the project has been granted by the AEUB (permit or licence), then the company uses the right-of-entry process to gain access and secure the lands by a right-of-entry order. The following is a brief overview of how to prepare for the Surface Rights Board hearing.

If private negotiations have failed, what can you, as a landowner, expect when appearing before the Surface Rights Board? At the time of making application to the Surface Rights Board by the operator (company), the operator shall pay to the respondent (owner), as part payment of the compensation payable, a sum of money equal to 80 per cent of the compensation offered in the last written offer to the occupant and filed with the application. The operator **shall not** exercise his right of entry until this 80 per cent plus the total amount of the entry fee (page 4) has been paid. If you have any objections to the information in the application (Form A) or the Notice (Form B) you must bring your objections to the board within 14 days of the date of service to you by or on behalf of the board.

You have had input to the well site location, roadway and other matters. (See page 1) We will assume that location therefore is not a factor. A hearing will be held in your area, at a time selected by the board, if there are no objections by the landowner or the company. Start your preparation immediately as a hearing may be held within 30 days from the date the right-of-entry is issued. If either party request it, an on-site inspection may be held prior to the hearing or shortly thereafter. The hearing is informal. One must remember that the Surface Rights Board is a quasi-judicial board, and as such, can only make a decision based on the evidence. Therefore, **come prepared.** The board will accept oral evidence, but written is preferred as this affords you the opportunity to re-examine it prior to submission. This also enables the board to more clearly understand your concerns. If you are having problems compiling your submission, you are entitled to obtain professional assistance where needed. This would refer to the assembling of your submission and the associated cost, both professional and non-professional, plus all costs associated with the failed private negotiations. Again, the key here is "reasonable." As such, the Surface Rights Board will award all reasonable costs. **This does not mean that all costs will automatically be paid as submitted.**

With regards to market value, one should try to obtain information about comparable sales in the area and if possible, written evidence of those sales. This information is usually available through local realtors or the land titles office. These sales should then be listed on a county map to show their proximity to your land. You can submit comparable well sites that have been negotiated privately between companies and others in your area, again showing them on a county map. If possible, it would be worthwhile to obtain a copy of the agreement from the landowner. Otherwise, these submissions may have limited value. Also, try to contact the vendor or purchaser of recent land sales to find out if there were any extenuating circumstances that may have had an impact on market value. In regard to general disturbance, it is a good idea to keep a record or log of the time and costs associated with the negotiation stage. These expenses vary depending on the length of time you have spent on private negotiations and should include all expenses incurred to date for preparing your submission.

Your loss of use is based on previous farming practices and projected returns. If possible, have receipts available. The Surface Rights Board, unlike the practice usually followed for privately negotiated agreements, may subtract input expenses from the projected returns. Therefore, try to have an idea of what your input expenses are and your net return.

Adverse effect depends on the location of the well site. In many cases you have already farmed around it prior to the hearing, allowing you to assess the inconvenience factor. Use a diagram to show how the structure interferes or has a negative effect on your cropping practices. This will assist you with your explanation. This category is very difficult to determine and in many cases is subjective at best. However, one should have an idea, even if estimated, of how much more time is required to farm around the installation. Damage to land has been considered a factor under the board's jurisdiction, but it is the responsibility of Alberta Environment's Land Management Program when the well site, pipeline, or power line is abandoned to see that the land is properly reclaimed.

Any other factors that you wish to introduce at the hearing should be brought forward, accompanied by relevant documentation.

Once the board has issued a compensation order, you can appeal it to the Court of Queen's Bench within 30 days of its service upon you. This is done if you believe the decision is disputable on matters of law or jurisdiction and after consultation with your solicitor. The company also has this right. Costs are usually the responsibility of the company if it appeals. If your appeal is successful, your costs may be payable by the company. Who pays is at the court's discretion. In other words, each side is responsible for its own costs, or for the other side's as well, according to the judge's discretion.

A decision of the Queen's Bench can also be appealed into the Appellate Division, but at that stage one would be advised to proceed further only on the advice of a solicitor.

It is advisable to obtain a copy of the *Surface Rights Act* and read it prior to appearing before the board. Copies are available through the Farmers' Advocate Office, the Surface Rights Board or the Queen's Printer. One would also be advised to obtain copies of Board Orders within your area. If you are aware of any decisions and can acquire a decision number or the land location, copies are available for a nominal fee through the Surface Rights Board. If a hearing is planned in your area, you are allowed to sit in and observe the procedure. We would suggest both these things being done prior to your appearing before the board. This allows you to familiarize yourself with their procedure.

For further information or assistance contact the Farmers' Advocate office at (310-0000) 427-2433, or the Surface Rights Board in Edmonton at (310-0000) 427-2444.

Information and pamphlets explaining the function and authority of the Alberta Energy and Utilities Board, in relation to pipelines, transmission lines or well sites, are available by writing to the AEUB, 640 - 5th Avenue S.W., Calgary, Alberta, T2P 3G4, telephone (403) 297-8311 or after hours (403) 297-8303.

If farmers carefully study this booklet, they should be in a better position to successfully negotiate a satisfactory contract. Contracts for use on surface leases or easements and further information are available from the office of the Farmers' Advocate, 7000-113th Street, Edmonton, Alberta, T6H 5T6, telephone (780) 427-2433, or district offices of Alberta Agriculture, Food and Rural Development.

GLOSSARY

Access – The right of ingress to and egress from a privately owned tract of land from a public way without trespassing on privately owned property.

Appurtenances – This usually refers to above-ground structures on pipelines.

Certificate of Title – A document based on a title search stating that the title or interest in property is vested in a designated person, and showing outstanding liens, charges or other encumbrances.

Covenants – An agreement written into deeds, grants or conveyances promising performance or non-performance of certain acts, or stipulating certain uses or non-uses of the property.

Demised Premises – That portion of the land that the lessor grants to the lessee.

AEUB – Alberta Energy and Utilities Board

Easement – A nonpossessing interest held by one person in the land of another whereby the first person is accorded partial use of such land for a specific purpose. Examples of easements are rights of ways for electric power or pipelines.

Egress – The right to leave a tract of land.

Encumbrance – Anything that affects or limits the fee simple title to property, such as mortgages, easements, liens or restrictions of any kind.

Fee Simple – The greatest interest that one can hold in real property under our legal system.

Grantee – A person to whom a surface lease or easement is given, the company/operator.

Grantor – A person who grants a surface lease or easement, the landowner/farmer.

Indenture of Lease – The part of the lease that identifies both the lessor (farmer) and the lessee (the company) and their respective addresses, and the legal description of land as it is registered in the Land Titles Office.

Ingress – The right to enter a tract of land.

Lessee – One who acquires the right to use the property of another from whom the lease is obtained, or one who rents property under a lease.

Lessor – One who rents real property to another or conveys or leases the right of the use of real estate to another.

Market Value – The highest price for which property can be sold in the open market by a willing seller to a willing purchaser.

Major Transmission Line –

1. For the purpose of section 30(2)(b) of the Act, "major power transmission line structures" means any structures which are part of a transmission line, as defined in the Hydro and Electric Energy Act, that
   (a) transmits electric energy in bulk from generating plants to major substations, and
   (b) is classified by the Alberta Energy and Utilities Board as a 69 Kilovolt transmission line or larger.

2. The Definition Regulation (Alta. Reg. 146/85) is repealed.

The following is added by the Farmers' Advocate Office as further clarification on the(AEUB) Definition of a Transmission Line.

TRANSMISSION LINE AS DEFINED IN THE HYDRO AND ELECTRIC ENERGY ACT IS AS FOLLOWS:

1. "transmission line" means a system or arrangement of lines of wire or other conductors and transformation equipment, wholly in Alberta, whereby electric energy, however produced, is transmitted in bulk, and includes
   (i) transmission circuits composed of the conductors which form the minimum set required to so transmit electric energy,
   (ii) insulating and supporting structures,
   (iii) substations,
   (iv) operational and control devices, and
   (v) all property of any kind used for the purpose of, or in connection with, or incidental to, the operation of the transmission line, but does not include a power plant or an electric distribution system.

2. The decision of the Board (Energy Resources Conservation Board) is final as to whether
   (a) a definition in subsection (1) is applicable in a particular case, or
   (b) any line or system or installation is, or is part of, a power plant, a transmission line, industrial system or an electric distribution system.

Occupant – A person, other than the registered owner, who is in actual possession of the land or entitled to be in possession of the land.

Owner – The person in whose name a Certificate of Title has been issued pursuant to The Land Titles Act.

Right-of-Entry Order – An order of the Surface Rights Board granting to an operator the use of a certain area of the land surface for operations such as drilling for minerals, constructing roadways.

Right-of-Survey Entry – The right to pass across the lands of another, the land, properly or interests therein, usually a strip acquired for survey purposes.

Surface Lease – Any agreement entered into by an owner or occupant with an operator under which the surface of the land may be used and which provides for the payment of compensation (rental or otherwise).

Recommended Reading

Surface Rights in Alberta (Surface Rights Board Publication)

Transmission Lines and the Regulatory Process in Alberta (AEUB Publication)

Well-site Selection and the Surface (AUEB Publication)

Responding to Public Concerns about Oil and Gas in Alberta (AEUB Publication)

The Land Conservation and Reclamation (LCRC), a two-page document by Alberta Environment

Pipelines and Surface (AEUB Publication)

The Target Areas Designated for Oil and Gas Wells in a Large Portion of Alberta's Agricultural Areas.